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Decisions to Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior

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DECISIONS TO GRANT AND DENY HEARINGS IN THE CALIFORNIA SUPREME COURT: PATTERNS IN COURT AND INDIVIDUAL BEHAVIOR

Lawrence Baum*

I. INTRODUCTION

In an appellate court with the power of discretionary jurisdiction,[1] the exercise of this power is a most important process. A court that can determine which cases it will hear not only has the negative power to turn aside issues it prefers not to address, but it also has a positive ability to set its own agenda. Certainly the decision whether or not to take jurisdiction of particular cases is an integral part of the policy-making process in these courts, and it deserves the same close attention accorded to decisions on the merits of cases accepted for hearing.

Unfortunately, the study of the exercise of discretionary jurisdiction is beset by difficulties. A court often does not supply an explanation of its decision to take or to refuse jurisdiction of a case.[2] Nor, in most instances, are the individual votes of particular judges in the screening process made public.[3]

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1. The United States Supreme Court and approximately one half of the state supreme courts possess discretion to allow or to refuse full hearings to most appellants. With some exceptions, the courts with discretionary jurisdiction exist in judicial systems with an intermediate appellate court below them to hear appeals as a matter of right. *See* AMERICAN JUDICATURE SOCIETY, SOLUTIONS FOR APPELLATE COURT CONGESTION AND DELAY: ANALYSIS AND BIBLIOGRAPHY, INFORMATION SHEET No. 24, at 13-14 (1963).

2. One study found that the United States Supreme Court provided meaningful explanations of grants of certiorari in nearly half the cases accepted. Tanenhaus, Schick, Muraskin, & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in THE FEDERAL JUDICIAL SYSTEM 109, 111-12 (T. Jahnige and S. Goldman eds. 1968) [hereinafter cited as Tanenhaus]. The Supreme Court, like other courts with discretionary jurisdiction, virtually never supplies an explanation of its *denials* of certiorari. *See* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-18 (1950).

3. In recent years, Justices of the United States Supreme Court increasingly have indicated dissents from denials of certiorari. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 115-31 (1975)[hereinafter cited as COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM]. At least one state court, that of California, makes votes public. *See* discussion of these data in text accompanying notes 14-15 *infra*.

Thus much is hidden from the student of the judicial process who seeks to understand why hearings are granted to some appellants and denied to others.

Faced with these difficulties, some scholars nevertheless have probed the case-screening process through close analysis of the characteristics of cases accepted or rejected by a particular court. At the national level, the study of certiorari decisions in the Supreme Court by Joseph Tanenhaus and his colleagues in 1963 is an excellent example of this kind of work.[4] Perhaps the most valuable studies of this type at the state level are two Notes on petitions for hearing in the California Supreme Court, published in 1951 and 1952.[5] But even these studies were limited by the absence of data on the voting of individual justices in the screening of cases. The value of this kind of data is indicated by the recent work of S. Sidney Ulmer on certiorari decisions in the United States Supreme Court. Ulmer has made extensive use of individual-vote data which were included in the papers of the late Justice Burton. Not surprisingly, he has been able to provide valuable new insights into the motivations of Supreme Court Justices in voting for or against writs of certiorari.[6]

From the research by Ulmer and others, much has been learned about the process of case-screening in courts with discretionary jurisdiction. Perhaps the most important finding has been that judges seem to respond to petitions for hearing largely in terms of their assessments of the lower-court decisions in question; they are much more likely to favor a hearing

4. Tanenhaus, *supra* note 2. *See also* Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L.J. 131 (1955); Hanus, *Denial of Certiorari and Supreme Court Policy-Making*, 17 AM. U.L. REV. 41 (1967); Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962).

5. Note, *To Hear or Not to Hear: A Question for the California Supreme Court*, 3 STAN. L. REV. 243 (1951) [hereinafter cited as 1951 Note]; Note, *To Hear or Not to Hear II*, 4 STAN. L. REV. 392 (1952) [hereinafter cited as 1952 Note]. *See also* Jacobs, *The Supreme Court of Ohio, 1969 Term*, 30 OHIO ST. L.J. 626, 632 (1969); Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3 (1971) [hereinafter cited as Lilly & Scalia].

6. Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On the Merits,"* 4 POLITY 429 (1972) [hereinafter cited as Ulmer, *Decision to Grant Certiorari*]; Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121 (1973); Ulmer, *Supreme Court Justices as Strict and Not-so-Strict Constructionists: Some Implications*, 8 LAW & SOC'Y REV. 13 (1973) [hereinafter cited as Ulmer, *Supreme Court Justices*]. *See also* J. Stookey, Possible Linkages Between Jurisdictional Change and Policy Output in the Supreme Court, 1975 (unpublished paper presented at meetings of Midwest Political Science Ass'n).

when they feel that the lower court has erred. At both the federal and state levels, this "monitor policy"[7] is suggested by the high rates of reversal in courts that screen appeals.[8] Moreover, Ulmer has produced several findings that point to a monitor policy; for instance, he found a significant correlation for individual Justices between votes to grant certiorari and votes to reverse lower-court decisions in cases accepted for full hearings.[9]

However, studies also have indicated that factors other than response to the merits of lower-court decisions play important roles in the exercise of discretionary jurisdiction. Conflict among lower courts and the existence of significant new issues—factors specified in Rules of the United States and California Supreme Courts[10]—clearly influence some screening decisions.[11] The significance of certain kinds of subject matter and of certain parties as "cues" for the acceptance of cases by the United States Supreme Court also has been shown.[12]

No method of analysis can establish the precise combination of considerations involved in case-screening decisions in any court. However, as earlier studies have shown, it is possible to gain insight into the factors that shape these decisions by analyzing patterns of decision. This paper represents an attempt to use data on votes of individual justices of the California Supreme Court to cast some light on the court's decisions to grant or deny hearings to litigants.[13]

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7. This term is borrowed from 1951 Note, *supra* note 5, at 266-68.

8. G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 43-66 (1959); 1951 Note, *supra* note 5, at 246-55.

9. Ulmer, *Decision to Grant Certiorari, supra* note 6. *See also* Ulmer, *Supreme Court Justices, supra* note 6.

10. U.S. SUP. CT. R. 19; CAL. R. OF CT. 29(a).

11. *See, e.g.*, 1952 Note, *supra* note 5, at 397-98. *But see* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *supra* note 3, at 93-133; Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

12. Tanenhaus, *supra* note 2; *but see* Ulmer, Hintze, & Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC'Y REV. 637 (1972).

13. The procedure by which the California Supreme Court decides whether to grant or deny hearings will not be discussed in this paper. For those unfamiliar with this procedure, it should be noted that four favorable votes are required to hear a case. Judges of the California Court of Appeal occasionally sit with the Court to decide on petitions for hearing when one or more justices are absent; their votes will be ignored in this study. On the court's procedure, *see* Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309, 309-15 (1974); Mosk, *Foreword: The Rule of Four in California*, 63 CALIF. L. REV. 2 (1975). The court possesses the power to hear cases on its own

The California Supreme Court long has listed in its minutes votes to grant hearings under its discretionary jurisdiction. These data have one limitation for the study of individual justices' behavior: the minutes list only votes to hear cases, not votes to deny hearings, and the absences of particular justices generally are not indicated. Thus it is frequently impossible to determine with certainty whether an unlisted member of the court voted to deny a hearing or simply was absent. The seriousness of this ambiguity, however, is reduced by the fact that justices usually are absent from the court's conferences only infrequently and by the fact that some absences can be ascertained from the minutes.[14] For these reasons it is acceptable to assume that an unlisted justice voted against hearing a case unless an indication exists that he was absent or did not participate in that case. The volume of erroneous information thereby obtained will be tolerable. One who makes use of the data in the minutes must be cautious in interpreting them because of the problem noted here, but this problem is not so serious as to preclude use of these data.[15]

Individual-vote data may be analyzed in several ways to probe the process of decision on petitions for hearing in the California Supreme Court.[16] This paper will examine the influence of several case characteristics on the court's treatment of petitions by cross-tabulating the selected variables—subject matter, the existence of conflict in the lower courts, the presence of the government as a party, and the ideological position

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motion; cases heard under this power have been excluded from this analysis. On the exercise of this power, *see* Note, *California Supreme Court Review: Hearing Cases on the Court's Own Motion*, 41 S. CAL. L. REV. 749 (1968). For other sources on the court's decision to grant or to deny hearings, *see* Poulos & Varner, *Review of Intermediate Appellate Court Decisions in California*, 15 HASTINGS L.J. 11 (1963); 1952 Note, *supra* note 5; 1951 Note, *supra* note 5.

14. Justices who deem themselves disqualified from considering a particular petition are listed in the minutes. In addition, the absence of the Chief Justice usually can be ascertained because of the designation of another member of the court as Acting Chief Justice. When the court accepts a large number of petitions with near-unanimity or when participation by a court of appeal judge is indicated, it is sometimes possible to ascertain the absence of an associate justice. Undoubtedly, however, many absences were undetected.

15. The problem of erroneous data will not be referred to in the remainder of the paper, but the existence of this problem is reflected in a special caution in interpreting relationships between variables.

16. In a previous paper this author used scaling analysis to examine ideological dimensions in the screening of petitions in criminal cases. L. Baum, The Judicial Gatekeeping Function: A General Analysis and a Study of the California Supreme Court, 1975 (unpublished paper presented at meetings of Am. Pol. Sci. Ass'n) [hereinafter cited as Baum].

of the lower court's opinion—against individual justices' votes to grant or to deny hearings. Particular attention will be given to the ideological position reflected in the decision of the court of appeal, as a means of understanding the significance of the justices' assessments of a particular decision's correctness. These findings, while they will provide only one perspective on the process of case-screening, should contribute to a fuller understanding of the treatment of petitions for hearing in the California Supreme Court.

The present analysis includes petitions for hearing that the supreme court granted or denied in the first six months of 1972 and in the first six months of 1974. Petitions were analyzed only in cases in which the court of appeal wrote a published opinion. The two six-month periods in effect provide the basis for two separate studies, so that the effect on the analysis of idiosyncratic patterns of decision in a particular period can be minimized. The study was limited to cases with published lower-court opinions because only in these cases could sufficient information on case characteristics be obtained; it must be underlined, however, that these cases constitute an unrepresentative sample of the entire body of cases in which a hearing is sought from the supreme court.[17]

The analysis will begin with a short general description of the supreme court's treatment of petitions in the two samples to be studied. Then the relationship between selected case characteristics and the justices' response to petitions will be examined successively. A brief digression then will be taken to examine the relationship between the decision to accept a case and the later decision on its merits. Finally, the implications

17. The source used for published opinions was the *California Reporter*, because the official *California Appellate Reports* deletes opinions in cases accepted for hearing by the supreme court. The Appellate Reports published only 15% of all court of appeal opinions in fiscal 1974, and opinions are written in fewer than three quarters of all decisions (original proceedings excluded). JUDICIAL COUNCIL OF CALIF., ANNUAL REP. OF THE ADMIN. OFFICE OF THE CALIF. COURTS 77, 81-82 (1975). The unrepresentative character of court of appeal cases with published opinions is ensured by the rules for publication of opinions. *See* CAL. R. OF CT. 976(b), which provides that no opinion of the court of appeal or the appellate division of the superior court shall be published in the official reports unless it

> (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law.

Id. Thus, strictly speaking, our findings cannot be generalized to the court's decisions in cases without published opinions. However, there is no reason to expect that justices will exhibit patterns of decision in cases with published opinions that differ substantially from patterns in other cases.

of our findings for an understanding of the case-screening process will be discussed.

II. Cases and Decisions: The Factors

General Information

Table 1 provides an overview of the cases in the two samples. The great majority of petitions in the samples were denied by the supreme court, but the proportions accepted were somewhat higher than for all the petitions to the court in the two periods.[18] The majority of cases studied arose from civil rather than from criminal trials.[19] The distribution of petitions among the five districts of the California Court of Appeal is similar to the distribution of the caseloads of the several districts; it is not surprising that a large majority of cases come from the appellate courts in San Francisco (first district) and Los Angeles (second district).

TABLE 1

SELECTED CHARACTERISTICS OF CASES IN SAMPLES

Year	1972 No.	1972 Pct.	1974 No.	1974 Pct.
Total	227	100%	223	100%
Sup. Ct. Decision				
Grant	38	17	46	21
Deny	189	83	177	79
Subject				
Civil	135	60	139	62
Crim.	92	40	84	38
District				
1st	71	31	64	29
2nd	104	46	94	42
3rd	22	10	25	11
4th	20	9	25	11
5th	10	4	15	7

18. From January through June, 1974, the court accepted only 8.8% of all petitions for hearing, less than half the proportion accepted in our sample of cases for that period. This fact underlines the unrepresentative character of cases with published opinions.

19. Throughout this study, cases will be classified as criminal if they arose from criminal trials, even though their docket classification is civil in some instances. The only exceptions to this rule are cases not involving the defendant as a party (*e.g.*, "gag orders" on newspapers).

The distribution of votes for and against hearings, shown in Table 2, indicates the extent of dissensus on the court. Although a majority of petitions received no votes for hearing, most of the remaining cases provoked disagreement among justices. This fact suggests the value of examining individual voting patterns in addition to the decisions of the court as a whole. The most notable difference between the two periods in the distributions of votes is in the larger number of cases with single votes for hearing in 1972. This difference is explained by the presence of Justice Peters on the 1972 court; of the 28 lone votes to hear cases, 17 were his.

TABLE 2

DISTRIBUTION OF NUMBERS OF VOTES TO HEAR CASES

Votes to hear	1972		1974	
	No.	Pct.	No.	Pct.
0	131	57%	146	65%
1	28	12	14	6
2	17	7	8	4
3	13	6	11	5
4	8	3	13	6
5	11	4	7	3
6	7	3	7	3
7	12	5	17	8

The justices might be expected to differ substantially in their general willingness to hear cases. Table 3, which depicts each justice's votes for hearing as a percentage of his total votes, offers a mixed picture. The justices differed considerably from each other in 1972; most notable was Justice Peters' extraordinary propensity to vote for hearings. In 1974, however, only Justice Mosk deviated from the median by more than three percent. In relation to the differences that *could* exist, of course, even in 1972 the differences among justices were relatively small.

TABLE 3

VOTES TO GRANT HEARINGS AS PROPORTION OF ALL VOTES, BY JUSTICE

Justice	1972	1974
Wright	15.1%	22.0%
McComb	12.3	17.5
Peters	35.2	——
Tobriner	21.2	19.8*
Mosk	26.9	25.9
Burke	15.9*	20.7
Sullivan	15.5	19.6
Clark	——	18.8

*Median for year.

Subject Matter of Cases

One variable that might be expected to influence the decision to hear a case is its subject matter. One or more justices may have a particular interest in particular subjects; "important" subjects (constitutional issues, for instance) may attract special attention, or—on the negative side—subject matter seen as uninteresting or unimportant may be eschewed. Tanenhaus and his colleagues found that the United States Supreme Court was far more likely to hear a case with a civil liberties issue than one in which no such issue existed.[20] Data on discretionary jurisdiction in some of the states also suggest preferences for cases involving certain kinds of issues.[21]

For the two samples of cases analyzed, the possible influence of subject matter first was examined broadly, in terms of the dichotomy between criminal and civil subjects. Table 4 shows that the court as a body had a very slight tendency to prefer criminal cases in 1972 and a somewhat stronger tendency in the same direction in 1974. Even in 1974, the propensity to hear criminal cases was not statistically significant.[22] Nor, with the exception of Justice McComb in 1974, did any member of the court have a significant tendency to favor criminal cases. The differences among members of the court were relatively limited. The greatest deviation from the "difference score" for the court as a body was 9.1 percent for Justice Peters in 1972, a deviation reflecting his relatively great interest in criminal cases.

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20. Tanenhaus, *supra* note 2, at 117-19.

21. *See, e.g.*, Lilly & Scalia, *supra* note 5, at 64; 1952 Note, *supra* note 5, at 399.

22. The chi-square statistic will be used throughout the study to determine the significance of relationships between variables. This statistic generally is employed to determine whether a relationship found in a sample of cases is likely to reflect a true relationship in a "universe" of cases that includes the sample. But we may not generalize statistically from published-opinion cases to all cases, because this sample is not random. *See* H. BLALOCK, 1 SOCIAL STATISTICS 214 (1960) [hereinafter cited as H. BLALOCK]. However, the chi-square test may be used to determine whether the relationships that appear in the totality of published-opinion cases are likely to be a product simply of a random distribution of justices' votes. Hagood, *The Notion of a Hypothetical Universe*, in THE SIGNIFICANCE TEST CONTROVERSY 65 (D. Morrison & R. Henkel eds. 1970). Using the chi-square test, we shall consider a relationship significant when there are fewer than five chances in one hundred that it would be found with randomly distributed data.

TABLE 4

PROPORTION OF VOTES FOR HEARING, BY CIVIL-CRIMINAL SUBJECT MATTER

Justice	1972 Crim.	1972 Civil	1972 Diff.[a]	1974 Crim.	1974 Civil	1974 Diff.[a]
Wright	16.3%	14.3%	+ 2.0	26.0%	19.5%	+ 6.5
McComb	13.0	11.9	+ 1.1	26.2	12.2	+14.0*
Peters	41.3	31.1	+10.2	——	——	——
Tobriner	26.3	17.8	+ 8.5	20.2	19.6	+ 0.6
Mosk	23.9	28.9	− 5.0	28.6	24.3	+ 4.3
Burke	13.0	17.8	− 4.8	25.0	18.1	+ 6.9
Sullivan	19.6	12.7	+ 6.9	22.1	18.0	+ 4.1
Clark	——	——	——	25.3	14.8	+10.5
CT. DECISION	17.4	16.3	+ 1.1	25.0	18.0	+ 7.0

Note: in this and succeeding tables, percentages represent justice's votes to grant hearings as proportion of all his votes in cases with characteristics indicated. In this and succeeding tables, except where otherwise indicated, "difference" is percentage in second column subtracted from percentage in first column.

*Significant at .05 level, chi-square test.

[a]Difference between two percentages.

It is perhaps not surprising that justices should fail to show strong preferences to hear criminal or civil cases *per se*; these are very broad categories. To probe for more narrowly focused subject-matter preferences, cases were coded according to the West topic classification. Thirty-four issue categories were established, each based on one or a combination of West topics. These categories included both substantive issues (*e.g.*, property, divorce) and issues related to legal procedure (*e.g.*, mandamus). Each case was coded according to the presence or absence of each issue in the appellate court opinion.[23]

Only eight issues or sets of issues appeared 15 times or more in one or both samples of cases. With one exception, the presence or absence of these issues made little difference in the disposition of the petitions for hearings. As Table 5 shows, only the "courts" issue increased more than marginally the likelihood of hearing a case, and the presence of this issue was significantly related to a decision to grant a hearing only in 1974. The finding does, however, suggest a particular interest by the court in questions of court jurisdiction and procedure, an inter-

23. In determining the presence or absence of each issue, reliance was placed on the judgment of the West Company personnel who devised the headnotes for cases in the *California Reporter*. If an issue was included in the headnotes, it was coded as present. For those unfamiliar with the West system, *see* M. L. COHEN, 2 LEGAL RESEARCH IN A NUTSHELL 42-54 (1971).

est consistent with the supreme court's role as head of the state judicial system.[24]

TABLE 5

PROPORTION OF CASES ACCEPTED FOR HEARING BY PRESENCE OR ABSENCE OF PARTICULAR ISSUES

Issue[a]	Year	Times Mentioned	Issue Present	Issue Absent	Diff.
Police Procedure[b]	1972	36	16.7%	16.8%	− 0.1
	1974	21	14.3	21.3	− 7.0
Trial Procedure[c]	1972	84	16.7	16.8	− 0.1
	1974	86	22.1	19.7	+ 2.4
Mandamus	1972	18	22.2	16.3	+ 5.9
	1974	23	17.4	21.0	− 3.6
Courts	1972	16	31.3	15.6	+15.7
	1974	21	42.9	18.3	+24.6*
Govt. units[d]	1972	32	25.0	15.4	+ 9.6
	1974	22	9.1	21.9	−12.8
Criminal law[e]	1972	74	18.9	15.7	+ 3.2
	1974	72	22.2	19.9	+ 2.3
Drugs, liquor	1972	18	22.2	16.3	+ 5.9
	1974	16	25.0	20.3	+ 4.7
Constitutional law	1972	41	12.2	17.7	− 5.5
	1974	35	22.9	20.2	+ 2.7

*Significant at .05 level.

[a] Issues included only if mentioned 15 or more times in sample.

[b] Includes: arrest, search and seizure.

[c] Includes: 16 issues related to trial procedure (*e.g.*, deposition, pleading, evidence).

[d] Includes: states, counties, municipal corporations.

[e] Includes: criminal law, all specific crimes except those related to drugs, liquor.

The data for the court as a body might mask significant tendencies on the part of individual justices. However, individuals showed subject-matter preferences no stronger than those for the court as a whole. Several issues elicited somewhat positive reactions from one or more justices, but only in three instances was there a significant relationship between the presence of a specific issue and a justice's willingness to vote for a hearing. In 1974 Justice Mosk voted to hear cases with a

24. The "courts" category

> includes the judicial department of government; nature and scope of judicial power in general; establishment, organization, and conduct of business of courts; ministerial officers attached to them; jurisdiction and procedure peculiar to particular courts; and concurrent and conflicting jurisdiction and comity between courts.

8 OHIO DIGEST 746 (1949).

"courts" issue 50 percent of the time, against 23.5 percent of the time when this issue was absent. In 1972 both Justice Peters and Justice Tobriner had strong preferences for cases with issues of police procedure: Peters' willingness to hear cases increased from 30.9 percent to 58.3 percent when this issue was present, Tobriner's from 17.5 percent to 40.6 percent. For other issues and other justices, the presence or absence of an issue had only a marginal relationship with the vote to grant or deny a hearing. Nor, with a few exceptions,[25] did justices show strong preferences for any of the issues that appeared fewer than 15 times in either sample.

This negative finding is notable. It is possible that an alternative scheme of issue-classification would have located issues that induced significantly positive reactions from justices. But the near-absence of strong relationships between the votes of the justices and any of a variety of issues suggests strongly that subject matter in itself is not an important cue to the justices. The mere presence of a constitutional issue, to take one example, seems to be unimportant in itself; rather, it is other characteristics of cases with constitutional issues that make the difference.

Lower-Court Disagreement

All cases in which the California Supreme Court has discretion to grant or deny hearings have been heard by the court of appeal. Cases decided by the court of appeal in turn have come from the superior court or from an administrative tribunal, either by direct appeal or through a request for a writ such as mandamus. In some cases with petitions for hearings, all the lower-court judges[26] have joined in the decision. In other cases there is disagreement among lower-court judges, involving dissent in the court of appeal or a court of appeal modification or reversal[27] of the judicial or administrative decision before it.[28]

25. Most notably, Justice Peters voted to hear 60% of the cases involving workmen's compensation issues in 1972 (N=10), and Justice Mosk voted to hear 50% of the cases involving the "statutes" issue in 1974 (N=14).

26. For simplicity, in this section the term "lower-court judges" will be used to refer also to administrative agencies when cases come to the court of appeal from agencies.

27. For our purposes, modifications and reversals will be considered equivalent, and in most instances both actions will be referred to as "reversals."

28. A request to the court of appeal for issuance of a writ is not truly an appeal from the trial court, and the court of appeal in such a case does not "affirm" or

There are at least two reasons to expect that the supreme court will react relatively favorably to petitions for hearing in cases with lower-court disagreement. First, disagreement among the judges below may suggest to the court the difficulty or closeness of the issues involved in a case. Most justices undoubtedly are interested in settling open legal questions within the state judicial system, so that difficult and close issues should be attractive candidates for hearings, whatever a justice's feelings about the merits of these issues. Second, where a question is close enough to provoke disagreement among lower-court judges, it is relatively likely that supreme court justices will question the correctness of the court of appeal's decision. In turn, the suspicion that the court of appeal has decided a case wrongly may impel the justices to support a petition for hearing.[29]

The relationship between lower-court disagreement and the supreme court's decisions on petitions for hearing can be analyzed for each of the two types of disagreement separately, and then for a combined "disagreement" variable. The proportions of cases involving appellate court reversals of a trial court or administrative body were high in both samples—47 percent in 1972 and 48 percent in 1974. As Table 6 shows, reversal cases were more likely to be accepted by the supreme court, and this tendency was highly significant in 1974. The fact that cases which had been reversed on appeal were nearly three times as likely to be granted hearings as were other cases in 1974 is notable. For individual justices the pattern generally was the same as for the court as a whole: weak positive relationships between reversal by the court of appeal and votes for hearing in 1972, strong positive relationships in 1974. The major deviation was by Justice Mosk, with a slightly negative relationship in 1972 and a weak positive relationship in 1974.

"reverse" the trial-court decision. However, in a non-technical sense a request for a writ is an attempt to overturn the trial-court decision in question, so that the issuance or denial of a writ can be interpreted as an affirmance or reversal of the trial court. This usage has been adopted in this study.

29. The 1951 and 1952 studies of the California Supreme Court found some evidence that lower-court disagreement was associated with the court's acceptance of cases. 1951 Note, *supra* note 5, at 257; 1952 Note, *supra* note 5, at 399. Similar findings have been obtained for the United States Supreme Court. Tanenhaus, *supra* note 2, at 116-17; Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33, 47 (1973).

TABLE 6

PROPORTION OF VOTES FOR HEARING, BY COURT OF APPEAL AFFIRMANCE AND REVERSAL

Justice	1972 Rev.[a]	1972 Aff.	1972 Diff.	1974 Rev.[a]	1974 Aff.	1974 Diff.
Wright	18.8%	11.7%	+ 7.1	30.0%	14.3%	+15.7*
McComb	16.0	9.1	+ 6.9	27.8	7.8	+20.0**
Peters	36.8	33.9	+ 2.9	——	——	——
Tobriner	25.0	18.2	+ 6.8	28.0	12.2	+15.8**
Mosk	26.4	27.3	− 0.9	30.5	21.7	+ 8.8
Burke	22.6	9.9	+12.7*	30.8	11.3	+19.5**
Sullivan	18.1	13.2	+ 4.9	29.4	9.3	+20.1**
Clark	——	——	——	31.4	7.7	+23.7**
CT. DECISION	19.8	14.0	+ 5.8	30.6	11.3	+19.3**

*Significant at .05 level.
**Significant at .01 level.
[a] Includes all cases in which lower-court or administrative decision was modified or reversed.

Even in these special samples of cases, dissent in the court of appeal was relatively infrequent. There were 20 dissents in the 1972 sample, 14 in 1974. As Table 7 shows, when dissents did occur the supreme court was even more likely to grant hearings than in cases with reversals. This finding, of course, must be interpreted cautiously because of the small numbers of cases involved. No justice deviated greatly from the court's overall tendency in both years, though there were several major deviations for a single year.

TABLE 7

PROPORTION OF VOTES FOR HEARING, BY COURT OF APPEAL UNANIMITY AND DISSENT

Justice	1972 Diss.	1972 Unan.	1972 Diff.	1974 Diss.	1974 Unan.	1974 Diff.
Wright	25.0%	14.1%	+10.9	50.0%	19.9%	+30.1*
McComb	30.0	10.6	+19.4*	42.9	15.8	+27.1*
Peters	45.0	34.3	+10.7	——	——	——
Tobriner	40.0	19.7	+20.3	50.0	17.8	+32.3**
Mosk	45.0	25.1	+19.9	46.2	24.6	+21.6
Burke	50.0	12.6	+37.4**	50.0	18.8	+31.2*
Sullivan	21.1	15.0	+ 6.1	50.0	17.3	+32.7**
Clark	——	——	——	53.8	16.6	+37.2**
CT. DECISION	30.0	15.5	+14.5	50.0	18.7	+31.3*

*Significant at .05 level.
**Significant at .01 level.

As might be expected, there was considerable coincidence between the existence of reversal and of dissent in particular cases. Twenty of the 34 cases with dissent in the court of appeal also involved reversal of the trial court or administrative agency. The two variables were combined for this study, and cases are dichotomized according to the existence of either form of lower-court disagreement in Table 8. Because the great majority of appellate decisions involving dissents were also reversals, the court and individual-justice relationships in Table 8 are similar to those in Table 6: a limited relationship between lower-court disagreement and acceptance of cases in 1972, a strong relationship in 1974, and only limited deviation by individual justices from the aggregate pattern.

TABLE 8

PROPORTION OF VOTES FOR HEARING BY EXISTENCE OR ABSENCE OF LOWER-COURT DISAGREEMENT

	1972			1974		
Justice	Dis.[a]	Agree	Diff.	Dis.[a]	Agree	Diff.
Wright	18.9%	10.9%	+ 8.0	28.8%	14.9%	+13.9*
McComb	15.5	9.0	+ 6.5	26.8	8.1	+18.7**
Peters	38.8	31.5	+ 7.3	——	——	——
Tobriner	26.8	15.8	+11.0	27.0	12.6	+14.4*
Mosk	29.3	24.3	+ 5.0	29.4	22.5	+ 6.9
Burke	24.1	7.2	+16.9**	29.7	11.7	+18.0**
Sullivan	18.3	12.6	+ 5.7	28.3	9.7	+18.6**
Clark	——	——	——	30.3	7.3	+23.0**
CT. DECISION	20.7	12.6	+ 8.1	29.5	11.7	+17.8**

*Significant at .05 level.

**Significant at .01 level.

[a]Includes all cases in which Court of Appeal reversed decision and/or in which a Court of Appeal judge dissented.

The data in Tables 6-8 indicate that the court and its members did tend to favor petitions in cases with lower-court disagreement. However, interpretation of this finding is difficult. First, as has been noted, at least two motivations may impel justices to favor cases with disagreement below. Second, there was a considerable difference between the two samples of cases in the strength of the court's tendency to favor such cases. Only a cautious conclusion is justified: one or more qualities associated with lower-court disagreement have at least a marginal impact in increasing the likelihood that a hearing will be granted.

Government as a Party

Students of certiorari decisions in the United States Supreme Court have documented the success of the federal government as a petitioner; the government obtains hearings from the Court in a much higher proportion of cases than do other litigants as a group. This success appears to stem from several factors, particularly the Solicitor General's restraint in appealing unfavorable lower-court decisions.[30] It is possible that the Attorney General enjoys a similar success in the California Supreme Court for the same reasons. More broadly, the identification of the state or of government agencies as petitioners may influence justices positively or negatively in their treatment of petitions for hearing. Accordingly, the relative success of government agencies in obtaining hearings merits investigation.

For this study, no data were gathered on petitioning parties. However, cases were coded according to the presence of government as a party and the outcome for the government party in the court of appeal. Except in unusual instances, where a petition is taken from an appellate court decision, it is the losing party who petitions. Thus, the outcome in the court of appeal can stand as a surrogate for the identity of the petitioning party.

The analysis of government agencies as parties in this section will be restricted to civil cases.[31] First, all cases with agencies as parties, whether state or local in jurisdiction, may be examined as a body.[32] Cases were divided into three categories: those in which a government agency was victorious in the court of appeal, those in which an agency was defeated in the court of appeal, and those with no government party. A small number of cases in which two government agencies were opposed or in which a government agency obtained a mixed result in the court of appeal were excluded.[33] Forty-seven percent of the 1972

30. R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 173-77 (1971); Tanenhaus, *supra* note 2, at 115-16; Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154 (1960).

31. Analysis of this question for criminal cases would be repetitive because all criminal cases involve government on the "conservative" side, and the relationship between ideology and decision in criminal cases will be discussed in text accompanying notes 38-42 *infra*.

32. Appeals to the court of appeal from decisions of the Workmen's Compensation Appeals Board were classified as government-party cases, with the Board as the government party.

33. Six cases fell into these categories in 1972, three in 1974.

cases and 40 percent of the 1974 cases involved government parties, and these cases were divided almost equally between government victories and defeats.

The findings, shown in Table 9, are surprising. In both samples of cases, the court was somewhat less likely to grant a hearing in a case with a government loss below than in other cases. Inclination to grant or deny government petitions varied considerably among members of the court, but only Justice Burke gave a substantial advantage to government agencies—and he only in 1972. Indeed, in 1972 Justices Peters, Tobriner, and Mosk were all considerably more likely to grant petitions by non-government parties. For no justice in either year, however, was the government's advantage or disadvantage statistically significant.

TABLE 9

PROPORTION OF VOTES FOR HEARING BY PRESENCE OF GOVERNMENT AGENCY AND COURT OF APPEAL DECISION

Justice	No Govt.	Govt. Win	1972 No Govt. or Govt. Win[a]	Govt. Loss	Diff.[b]
Wright	19.4%	3.4%	14.6%	14.8%	+ 0.2
McComb	13.9	3.3	10.8	14.8	+ 4.0
Peters	36.1	30.0	34.3	18.5	−15.8
Tobriner	22.6	15.4	20.5	8.0	−12.5
Mosk	33.3	30.0	32.4	18.5	−13.9
Burke	18.1	6.7	14.7	29.6	+14.9
Sullivan	16.9	3.3	12.9	11.1	− 1.8
Clark	—	—	—	—	—
CT. DECISION	20.8	6.7	16.7	14.8	− 1.9

Justice	No Govt.	Govt. Win	1974 No Govt. or Govt. Win[a]	Govt. Loss	Diff.[b]
Wright	18.4%	25.0%	20.0%	20.0%	0.0
McComb	13.3	7.4	11.8	15.4	+ 3.6
Peters	—	—	—	—	—
Tobriner	19.5	22.2	20.2	15.4	− 4.8
Mosk	19.8	30.8	22.4	30.8	+ 8.4
Burke	20.5	14.8	19.1	16.0	− 3.1
Sullivan	18.1	20.8	18.8	17.4	− 1.4
Clark	16.0	7.4	13.9	20.8	+ 6.9
CT. DECISION	18.1	22.2	19.1	15.4	− 3.7

[a]Combined categories of cases.

[b]"No Govt. or Govt. Win" subtracted from "Govt. Loss."

The second part of the analysis was restricted to cases involving state agencies. The same three categories of cases were used. The number of cases in which state agencies were involved was small in both years, 30 in 1972 and 25 in 1974. Therefore, the data in Table 10 must be interpreted cautiously. However, it is notable that state agencies—like government agencies generally—are less successful in obtaining hearings than are other litigants. The data make it clear at least that the great success enjoyed by the Solicitor General in the United States Supreme Court is not shared by the Attorney General in the California Supreme Court.

TABLE 10

PROPORTION OF VOTES FOR HEARING BY PRESENCE OF STATE AGENCY AND COURT OF APPEAL DECISION

Justice	No State	State Win	1972 No State or State Win[a]	State Loss	Diff.[b]
Wright	16.7%	6.7%	15.3%	6.7%	− 8.6
McComb	13.3	6.7	12.5	6.7	− 5.8
Peters	34.3	26.7	33.3	13.3	−20.0
Tobriner	20.0	14.3	19.2	7.1	−12.1
Mosk	30.5	33.3	30.8	13.3	−17.5
Burke	18.1	13.3	17.5	20.0	+ 2.5
Sullivan	14.4	6.7	13.4	6.7	− 6.7
Clark	—	—	—	—	—
CT. DECISION	18.1	13.3	17.5	6.7	−10.8

Justice	No State	State Win[c]	1974 No State or State Win[a]	State Loss	Diff.[b]
Wright	20.8%	0.0%	19.3%	25.0%	+ 5.7
McComb	12.6	0.0	11.8	17.6	+ 5.8
Peters	—	—	—	—	—
Tobriner	20.0	0.0	18.6	23.5	+ 4.9
Mosk	24.1	12.5	23.3	29.4	+ 6.1
Burke	20.0	0.0	18.6	17.6	− 1.0
Sullivan	19.8	0.0	18.4	18.8	+ 0.4
Clark	15.9	0.0	14.8	17.6	+ 2.8
CT. DECISION	19.8	0.0	18.5	17.6	− 0.9

[a] Combined categories of cases.
[b] "No State or State Win" subtracted from "State Loss."
[c] N=8.

It is not surprising that local government agencies fared no better than other litigants in obtaining hearings from the supreme court. However, it is notable that state agencies did not obtain a higher proportion of hearings than did other claimants on the court's time. One reason may be the fact that the state petitioned for hearing somewhat more frequently than did its opponents; the restraint that goes far toward explaining the Solicitor General's success did not exist at the state level, at least during these two periods. Given this fact, the justices could be expected to treat state petitions with favor only if they had a strong personal inclination to hear the state's appeals, and such an inclination apparently did not exist.

Ideology

Most appellate-court decisions can be categorized as "liberal" or "conservative" in terms of the relationship between the court judgment and commonly accepted definitions of liberal and conservative positions on the issues involved.[34] There is good reason to expect the ideological position of the court of appeal to influence justices' reactions to petitions. Most important, members of the court are likely to exhibit differing responses to petitions in accord with the justices' relative position on a liberal-conservative continuum.

The predicted significance of ideology as a variable stems at base from the expectation that justices react to a petition largely in terms of their assessments of the court of appeal decision in question. Former Chief Justice Traynor once indi-

34. Several students of appellate-court decision-making have developed typologies of liberal and conservative positions on judicial issues. These typologies are based on conceptions of liberals as relatively favorable to "underdog" groups like criminal defendants, civil liberties claimants, and economically weak parties like employees and consumers, while favorable to the use of government power against business interests. Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975) [hereinafter cited as Goldman]; Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961) [hereinafter cited as Nagel]; Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROB. 100 (1963).

Judges' votes on particular issues tend to be cumulative; *i.e.*, if judges on a court are ranked according to their proportion of liberal votes on an issue, generally each judge votes in a liberal direction in every case in which judges with lower liberalism scores vote in a liberal direction. *See, e.g.*, Fair, *An Experimental Application of Scalogram Analysis to State Supreme Court Decisions*, 1967 WIS. L. REV. 449 (1967). The cumulative quality of voting on an issue is measured by Guttman scaling; on this procedure, *see* W.S. TORGERSON, THEORY AND METHODS OF SCALING 298-331 (1958) [hereinafter cited as W.S. TORGERSON].

cated that the central factor in the supreme court's treatment of a petition was the majority's view as to the correctness of the court of appeal decision,[35] and the 1951 and 1952 Notes on petitions for hearing provide ample evidence of the significance of this consideration.[36] A justice's assessment of the correctness of a court of appeal decision, in turn, is likely to depend largely on the ideological tenor of that decision. A justice with liberal views on a particular issue will tend to take a more positive view of a liberal court of appeal decision than of a conservative one. It follows that the more liberal a justice, as indicated by votes on the merits of accepted cases, the more likely he is to vote against hearing a liberal lower-court decision, and to favor review of a conservative decision.[37] Thus, just as the supreme court tends to divide ideologically in its decisions on the merits, so it can be predicted to divide ideologically in its decisions on petitions for hearing.

As this discussion suggests, the importance of the ideological position of the appellate court's decision as a variable may be determined chiefly through comparison among justices. Our central question is not whether the court as a whole has a significant proclivity to hear conservative cases or to hear liberal cases. Rather, we seek to determine whether justices differ from each other along ideological dimensions on petitions for hearing in the same ways that they do in decisions on the merits of accepted cases.

To resolve this question, we selected criteria to categorize positions as liberal or conservative and ranked the justices from most liberal to most conservative according to their votes in decisions on the merits of accepted cases. The same criteria were used to categorize court of appeal decisions as liberal or conservative. If our view of the role of ideology is accurate, the

35. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 213-14 (1957). Justice Peters shared this view. *See Memorial Proceedings for the Honorable Raymond E. Peters*, 108 Cal. Rptr. 1, 7-8 (1973). It is interesting that the California Supreme Court, in contrast with the United States Supreme Court, actually has indicated (albeit equivocally) that a denial of a hearing has some significance as to its view of a case. Di Genova v. Board of Educ., 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962); Eisenberg v. Superior Court, 193 Cal. 575, 578, 226 P. 617, 618 (1924). *But see* People v. Davis, 147 Cal. 346, 350, 81 P. 718, 720 (1905). This subject is discussed in Kanner, *It's a Busy Court: The Effect of Denial of Hearing by the Supreme Court on Court of Appeals Decisions*, 47 CAL. ST. BAR J. 188 (1972).

36. 1951 Note, *supra* note 5; 1952 Note, *supra* note 5.

37. This proposition is supported for criminal cases in the United States Supreme Court in Ulmer, *Supreme Court Justices*, *supra* note 6.

most liberal justices in decisions on the merits should also be those with the greatest relative tendency to vote for hearings in cases with conservative results in the court of appeal, while the most conservative justices on the merits should have the greatest relative tendency to vote for hearings in cases with liberal results below. Separate analyses of criminal and of civil cases were undertaken.

Criminal Cases. In criminal cases, a single criterion for liberal and conservative positions was used: a decision in favor of a criminal defendant or a vote for a defendant was classified as liberal; decisions and votes against defendants were classified as conservative.[38]

The position of each justice in decisions on the merits of criminal cases was computed from votes in non-unanimous criminal decisions in fiscal 1972 and fiscal 1974. The votes in these cases formed near-perfect Guttman scales, indicating that differences among the justices fell basically along a single dimension of relative favor for criminal defendants.[39] Table 11 shows the percentage of liberal votes in divided cases for each justice in each year. The rankings of the justices are similar in the two years, indicating a basic stability in their relative positions.

TABLE 11

PROPORTIONS OF LIBERAL VOTES IN NON-UNANIMOUS CRIMINAL CASES AND RELATIVE LIBERALISM OF JUSTICES (DECISIONS ON THE MERITS)

Justice	1972[a]		1974[a]	
	Prop.	Rank[b]	Prop.	Rank[b]
Wright	66%	5	70%	4
McComb	0	7	17	6
Peters	100	1	—	
Tobriner	100	1	91	1
Mosk	72	4	91	1
Burke	41	6	43	5
Sullivan	83	3	74	3
Clark	—	—	0	7

[a]Fiscal Years.

[b]1st rank is most liberal.

38. The same criterion has been used in other studies of judicial decision-making. Goldman, *supra* note 34; Nagel, *supra* note 34.

39. The coefficient of reproducibility for Guttman scales of votes in criminal cases was .99 in both years; the coefficient of scalability was .91 in 1972 and .94 in 1974. On the meaning of the Guttman scaling procedure, *see* W.S. TORGERSON, *supra* note 34.

In the two samples of cases with petitions for hearing, about two thirds of the criminal cases involved conservative decisions by the court of appeal. Table 12 shows each justice's propensity to vote to hear cases with liberal results and with conservative results; the small number of cases involving a mixed ideological outcome on appeal was excluded.[40] The data are interesting in several ways. First the relatively limited tendency to favor hearings with liberal results below is striking. It should be recalled that in nearly all instances "liberal" cases are those with petitions by the Attorney General, who ordinarily appeals only selected criminal cases; "conservative" cases, on the other hand, involve petitions by a defendant, who may have little incentive to bypass a petition for hearing even if his case is weak. Under these conditions, the fact that the Attorney General's advantage in the two samples was little over 10 percent suggests a strong liberal position on the part of the court as a whole and most of its members.[41]

TABLE 12

PROPORTION OF VOTES FOR HEARING, CRIMINAL CASES, BY IDEOLOGICAL POSITION OF COURT OF APPEAL

Justice	1972 Lib.[a]	1972 Cons.[a]	1972 Diff.	1972 Rank[b]	1974 Lib.[a]	1974 Cons.[a]	1974 Diff.	1974 Rank[b]
Wright	16.7%	18.2%	− 1.5	5	36.4%	20.8%	+15.6	4
McComb	28.0	8.3	+19.7	6	56.0	13.5	+42.5	5
Peters	16.0	53.3	−37.3	1	—	—	—	—
Tobriner	18.2	31.5	−13.3	2	28.0	17.3	+10.7	1
Mosk	24.0	26.7	− 2.7	4	36.0	25.0	+11.0	2
Burke	28.0	8.3	+19.7	6	60.0	7.7	+52.3	6
Sullivan	16.0	23.3	− 7.3	3	32.0	17.4	+14.6	3
Clark	—	—	—	—	62.5	9.6	+52.9	7
CT. DECISION	20.0	18.3	+ 1.7	—	40.0	17.3	+22.7	—

[a] Ideological position of Court of Appeal.

[b] 1st rank is most liberal (strongest inclination to hear cases with conservative results relative to cases with liberal results).

Even more significant is the tremendous disparity among the justices in their relative favor for liberal and conservative cases, as much as 57 percent between Justice Peters and Justices McComb and Burke in 1972, and 42 percent between Justices Tobriner and Clark in 1974. Moreover, the rankings of

40. There were seven cases with mixed results in each year.

41. This finding, of course, also corroborates the conclusion drawn from civil cases that the government as a party does not fare particularly well in the court's decisions on petitions for hearing.

the justices from most liberal to most conservative are almost identical with their rankings from liberal to conservative in decisions on the merits in these years.[42] In criminal cases, the proposition that justices' votes on petitions for hearing are related to their ideological positions on the merits of accepted cases is strongly supported.

Civil cases. Criteria for liberal and conservative positions in civil cases are necessarily more complicated and more debatable than in criminal cases. A scheme of criteria for the classification of California decisions was developed for this study, one based largely on an earlier set of criteria used by Stuart Nagel.[43] This scheme is shown in Table 13.

TABLE 13

CRITERIA FOR LIBERAL POSITIONS IN CIVIL CASES

1. For the government in business regulation cases.[a]
2. For the private party in regulation of non-business entities.
3. For the claimant in unemployment compensation and welfare cases.
4. For the government in tax cases.
5. For environmental regulation in environment cases.
6. For civil liberties claims under the 1st and 14th Amendments.
7. For the plaintiff in tort cases.
8. For the labor union or worker in labor-management cases.
9. For the debtor in creditor-debtor cases.
10. For the tenant in landlord-tenant cases.
11. For the consumer in sales-of-goods cases.
12. For the insured in insurer-insured cases.
13. For the individual in cases between businesses and individuals.

Note: These criteria are not all-inclusive; cases that could not be coded under these criteria were excluded from analysis.

[a] In liquor regulation cases, a position against regulation was classified as liberal.

42. The product-moment correlation between justices' liberalism scores in decisions on the merits (Table 11) and their relative willingness to hear cases with conservative results below (difference scores in Table 12) was .87 in 1972 and .91 in 1974. These correlations show a very close relationship between the two sets of scores; the correlation would be 0 if there were no relationship between the variables and 1.0 if the relationship were perfect. On the statistical procedure involved, *see* H. BLALOCK, *supra* note 22, at 285-99.

43. Nagel, *supra* note 34. *See also* Goldman, *supra* note 34. Civil cases, unlike criminal cases, involve a diverse range of issues. Accordingly, in combining votes in nearly all civil cases to create a single set of scores for the justices we may be combining different attitudinal dimensions; *e.g.*, the ranking of justices by liberalism in tax cases may be very different from their ranking in welfare cases. Goldman's analysis of voting behavior on the United States courts of appeals shows the existence of fairly high correlations between liberal voting records on most pairs of issues, but there are some exceptions. Goldman, *supra* note 34, at 494. Whether the votes of justices on the California Supreme Court in civil cases fall along a single attitudinal dimension that can be referred to as "liberalism-conservatism" will be indicated by Guttman scales of these votes. *See* note 44 *infra*.

As was done for criminal cases, non-unanimous civil decisions in fiscal 1972 and 1974 were analyzed to determine the justices' relative positions in decisions on the merits.[44] The rankings of the justices according to their support for liberal positions in civil decisions on the merits are shown in Table 14. These rankings are similar to those in criminal cases (Table 11); there are, however, some differences, the most notable being that in both years Justice Burke ranked as somewhat more liberal in civil cases.

TABLE 14

PROPORTIONS OF LIBERAL VOTES IN NON-UNANIMOUS CIVIL CASES AND RELATIVE LIBERALISM OF JUSTICES (DECISIONS ON THE MERITS)

	1972[a]		1974[a]	
Justice	Prop.	Rank[b]	Prop.	Rank[b]
Wright	48%	6	58%	4
McComb	14	7	21	7
Peters	85	1	—	—
Tobriner	75	3	89	1
Mosk	76	2	89	1
Burke	60	4	61	3
Sullivan	58	5	53	5
Clark	—	—	40	6

[a]Fiscal years.

[b]1st rank is most liberal.

The numbers of "liberal" and "conservative" civil cases in which the court was petitioned to grant hearings were about equal in both years. In these cases, Table 15 shows, the court indicated a consistent but limited preference to hear civil cases with conservative results. This finding supports the inference from the pattern in criminal cases that the court is liberally-inclined in decisions to grant or deny hearings. The differences among justices, however, are more notable than the court's tendencies as a body. Some justices voted to hear liberal and conservative cases at about equal rates, while others had strong tendencies to favor review of cases with conservative results.

44. A Guttman scale of votes in civil cases in 1972 has a coefficient of reproducibility of .92 and a scalability coefficient of .76. For 1974 the coefficient of reproducibility is .91 and the scalability coefficient .66. These coefficients meet the conventional criteria for acceptability of Guttman scales, but only marginally. *See* W.S. TORGERSON, *supra* note 34. This finding indicates that justices' disagreements in civil cases do not fall clearly along a single attitudinal dimension. Thus, when we refer to "more liberal" and "more conservative" justices in civil cases, we will be referring to overall tendencies based upon multiple dimensions of attitudes.

The differences among justices were considerable, though the range of scores was more limited than in criminal cases. Again, the justices' relative liberalism in this stage of decision was very similar to their relative liberalism in decisions on the merits. The one notable difference lay in Justice Burke's more conservative position on petitions for hearing.[45]

TABLE 15

PROPORTION OF VOTES FOR HEARING, CIVIL CASES, BY IDEOLOGICAL POSITION OF COURT OF APPEAL

	1972				1974			
Justice	Lib.[a]	Cons.[a]	Diff.	Rank[b]	Lib.[a]	Cons.[a]	Diff.	Rank[b]
Wright	11.8%	18.3%	− 6.5	5	20.0%	22.6%	− 2.6	4
McComb	11.3	10.8	+ 0.5	6	13.0	12.1	+ 0.9	5
Peters	13.2	43.1	−29.9	1	—	—	—	—
Tobriner	10.6	23.2	−12.6	3	11.3	29.3	−18.0	2
Mosk	13.2	38.5	−25.3	2	17.0	36.8	−19.8	1
Burke	18.9	16.9	+ 2.0	7	22.6	17.2	+ 5.4	6
Sullivan	9.4	16.9	− 7.5	4	16.0	22.4	− 6.4	3
Clark	—	—	—	—	20.8	10.7	+10.1	7
CT. DECISION	11.3	21.5	−10.2	—	16.7	22.4	− 6.1	—

[a] Ideological position of Court of Appeal.

[b] 1st rank is most liberal (strongest inclination to hear cases with conservative results relative to cases with liberal results).

Interpretation and conclusions. A comparison of Tables 12 and 15 shows that few differences existed between the rankings of justices in criminal and in civil cases. In both years—though only to a marginal degree in 1974—Justice Mosk ranked as more liberal in civil cases than in criminal. Otherwise, the orderings of the justices were almost identical on the two sides of the law.[46] In addition, the orderings in both criminal and civil categories changed very little from 1972 to 1974 except as a result of Justice Clark's accession to the court. At least in relative terms, the ideological positions of the justices on petitions for hearing were highly stable.

Our analysis of ideology as a factor in the treatment of petitions has emphasized comparison among justices. The data instead might be interpreted in terms of each justice's preference for cases with liberal or with conservative court of appeal

45. The correlation between justices' relative liberalism in the two stages of decision in civil cases was .75 in 1972 and .80 in 1974, lower than for criminal cases but still quite high and statistically significant. *See* note 42 *supra*.

46. The correlation between justices' relative liberalism in decisions on criminal petitions and decisions on civil petitions was .83 in 1972 and .88 in 1974. *See* note 42 *supra*.

decisions. Taking this approach, one might conclude from Table 15, for instance, that the ideological variable was very important in decisions on civil petitions by Justices Peters and Mosk but that it was an unimportant variable for Justices McComb and Burke. However, a similar interpretation of Table 12 would lead one to conclude that in criminal cases it was Justices McComb and Burke who were ideologically inclined, while Justice Mosk was affected little by this factor. The conclusion that the significance of ideology for particular justices varies radically, depending on whether the case is criminal or civil, is difficult to accept.

An alternative interpretation of the data can be offered, one that seems more valid. According to this interpretation, the fact that some justices have high difference scores on the ideological variable while others have low scores means little in itself. Thus it can be assumed that both Justice McComb and Justice Mosk were influenced by ideology in civil cases, but the combination of ideology *and other considerations* resulted in McComb's voting to hear about the same proportion of cases with liberal and conservative decisions, while these multiple considerations resulted in Mosk's voting to hear a much higher proportion of cases with conservative decisions. As a result, Justice McComb obtained a high difference score with reference to the ideology variable in criminal cases, and Justice Mosk a low score. This does not mean that the significance of ideological considerations did not vary among judges, but only that such variation cannot be determined from the justices' difference scores.

The data from our two samples of cases strongly support the expectations expressed at the beginning of this section. The justices differed tremendously in their relative willingness to accept cases with liberal and conservative results in the courts of appeal. Moreover, the relative liberalism of the justices in their responses to petitions for hearing was closely related to their relative liberalism in decisions on the merits of accepted cases. These findings indicate that justices respond to petitions for hearing in terms of their assessments of the decisions in question and that these assessments are highly variable according to justices' own policy preferences.[47]

47. These findings are consistent with those obtained by Ulmer in his studies of certiorari decisions at the federal level. *See* authorities cited in note 6 *supra*.

Lower-Court Disagreement and Ideology: Comparative Importance

The analysis thus far has indicated the significance of two kinds of factors in the decision to grant or deny petitions for hearing. The first is the existence of disagreement among lower-court judges. The second is the ideological position adopted by the court of appeal. To understand more fully the court's decisions on petitions, it would be useful to compare the significance of these two factors.

Comparison is difficult, unfortunately, because the evidence for the significance of the two factors differs in nature. The importance of lower-court disagreement is indicated by the fact that justices were more willing to hear cases in which disagreement existed. In contrast, the significance of ideology was indicated by differences among justices in willingness to accept liberal and conservative cases. Therefore, the usual means of statistical control by which the relative importance of independent variables is determined are not applicable.

Nevertheless, a limited inquiry into the relative impact of these two variables is possible. If analysis is confined to those justices with substantial tendencies to favor hearings in liberal or in conservative cases, these tendencies can be examined in relation to the existence or absence of lower-court disagreement. Therefore an analysis was done of all justices with at least a 15 percent "bias" in favor of liberal or conservative cases on either the civil or criminal side of the law in either sample. As Table 16 shows, this criterion was met by seven justices (including two who qualified in both the 1972 and the 1974 sample) in criminal cases and by four justices (including one repeater) in civil cases. On the criminal side, all but one of the justices included (Peters in 1972) showed an inclination to hear cases with liberal court of appeal decisions; on the civil side, all showed a preference for cases with conservative decisions.

Analysis of criminal cases is complicated by the small number of cases with liberal court of appeal decisions and agreement among judges below. The data, however, do provide evidence for the significance of both variables examined. The importance of the agreement variable is indicated by the fact that the justices inclined to favor cases with liberal results nevertheless showed increased willingness to hear conservative cases when disagreement existed among the lower-court judges; Justice McComb in 1972 was the one exception to this pattern. The importance of the ideology variable is indicated

TABLE 16

PROPORTION OF VOTES FOR HEARING, BY LOWER-COURT DISAGREEMENT AND IDEOLOGICAL POSITION OF COURT OF APPEAL, SELECTED JUSTICES

Criminal Cases						
			Agree		Disagree	
Justice[a]	Year	All	Lib.[b]	Cons.	Lib.	Cons.
Wright	1974	26.0%	33.3%	12.1%	37.5%	40.0%
McComb	1972	13.0	0.0	9.5	29.2	9.6
McComb	1974	26.2	42.9	5.4	61.1	33.3
Peters	1972	41.3	0.0	42.9	16.7	77.8
Burke	1972	13.0	0.0	4.8	29.2	16.7
Burke	1974	25.0	42.9	2.7	66.7	20.0
Clark	1974	25.3	42.9	2.7	70.6	26.7

Civil Cases						
			Agree		Disagree	
Justice[a]	Year	All	Lib.	Cons.	Lib.	Cons.
Peters	1972	31.1%	8.3%	32.5%	17.2%	60.0%
Tobriner	1974	19.6	11.8	20.0	11.1	50.0
Mosk	1972	28.9	16.7	35.0	10.3	44.0
Mosk	1974	24.3	17.6	32.5	16.7	47.1

a Justices included only if "difference score" for liberal and conservative cases was at least 15%.

b In 1972 only one case in this category was decided; in 1974 only seven cases in this category were decided.

by analysis of cases with lower-court disagreement: in these cases, with the exception of Chief Justice Wright, justices' tendencies to favor either liberal or conservative cases remained strong.

Analysis of civil cases is facilitated by the fact that there were many cases in each of the four categories. The data indicate that each of the four justices was most likely to vote for hearing when the court of appeal decision was conservative *and* lower-court judges disagreed. However, the two conditions taken separately had different "effects." When the decision below was liberal, disagreement below did not greatly increase the willingness to hear cases; indeed, in three of the four cases this willingness actually decreased. In contrast, where there was agreement below, three of the justices were considerably more likely to vote for hearing when the result was conservative than when it was liberal. This pattern suggests both the significance of ideology and the interactive effect of the two variables.

The analysis performed in this section hardly allows a meaningful judgment about the relative significance of ideology and of disagreement among lower-court judges. It does,

however, offer some evidence for the importance of both variables in determining justices' votes on petitions for hearing.

III. Decisions on the Merits

The two Notes on petitions for hearing in the California Supreme Court in the early 1950's properly stressed the importance of the court's decisions on the merits to an understanding of its decisions on petitions for hearing.[48] If the court reaches judgments divergent from those of the court of appeal in the great majority of cases it hears, this fact suggests that the decision to hear a case indicates dissatisfaction with the lower-court decision. Individual-level data on decisions on the merits are useful for the same purpose. Ulmer's finding that United States Supreme Court Justices were more likely to vote to reverse lower-court decisions when they had voted to grant certiorari[49] supports the conclusion that votes on certiorari are based on evaluations of the correctness of lower-court decisions. Accordingly, it is worthwhile to examine collective and individual decisions on the merits for their implications.

The California Supreme Court as a whole showed a strong tendency to differ with the court of appeal in cases it accepted. In the 1972 sample of cases, the court granted hearings in 28 cases which it later decided with opinion.[50] In 20 of these cases (71 percent), it reached a judgment different from that of the court of appeal, a judgment that would be labelled a modification or reversal if the supreme court were directly reviewing the lower appellate courts in these cases.[51] In the 1974 sample, the court reached a result different from that of the court of appeal in 20 of 32 cases, 62.5 percent. Similar proportions were found in the 1951 and 1952 studies of the court.[52] The supreme court's divergence from the court of appeal in about two-thirds of the

48. *See* 1951 Note, *supra* note 5, at 246-55; 1952 Note, *supra* note 5, at 395-97.

49. Ulmer, *Decision to Grant Certiorari*, *supra* note 6.

50. In 10 of the 1972 cases and 14 of the 1974 cases, the court granted a hearing but immediately or later retransferred the case to the court of appeal with instructions; no full opinion was issued. Most of these cases might be interpreted as involving supreme court "reversal" of the court of appeal, but they have been excluded from the statistical analysis here.

51. For those not familiar with California appellate procedure, it should be explained that the court in accepting a case vacates the court of appeal judgment, so that formally it is reviewing a decision of the trial court or administrative board which originally was appealed to the court of appeal.

52. The proportion found in the 1951 study was 64%, in the 1952 study 68%. 1951 Note, *supra* note 5, at 255; 1952 Note, *supra* note 5, at 396.

cases it hears is notable when compared with the much lower reversal rates typical of courts without discretionary jurisdiction.[53]

Even in the cases in which the court in effect affirmed the decision of the court of appeal, reaching the same result did not always mean agreement on the law. In several cases the supreme court based its decision on a ground different from that used by the court of appeal, sometimes expressly disapproving the reasoning of the lower court.[54] These cases provide additional support for the conclusion that the court hears cases largely because of dissatisfaction with the court of appeal decision.

In the remaining cases, the court's motivation for granting a hearing was not always apparent. Several involved important questions of law which a majority of justices apparently felt required a definitive ruling, although their opinions coincided with that of the court of appeal.[55] In some of the other cases, the grant of a hearing may well have stemmed from a tentative questioning of the lower-court ruling, followed by a final decision that the court of appeal indeed had been correct.

In view of the findings for the court as a whole, we might expect a strong relationship at the individual level between votes on petitions for hearing and votes on the merits of accepted cases. If a justice votes to grant hearings in part on the basis of his disagreement with court of appeal decisions, then he should be more likely to vote to "affirm" the court of appeal in cases which he had voted not to hear. Our data are too limited to test this proposition meaningfully; not only was the total number of cases small, but for most justices there were very few cases granted hearings over their dissent. Table 17 presents data for those justices with at least five cases accepted over their dissent in one or both samples.

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53. For instance, in a random sample of cases with written opinions in 1973, the California Court of Appeal reversed the decision under review in 29% of civil cases and 12% of criminal cases. NATIONAL CENTER FOR STATE COURTS, THE CALIFORNIA COURTS OF APPEAL 305 (1974). Others of the valuable reports of the Center show similar proportions in other appellate courts without discretionary jurisdiction. *See, e.g.*, T.J. FARER, THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT 90 (1974); J.D. LUCAS, THE APPELLATE PROCESS AND STAFF RESEARCH ATTORNEYS IN THE ILLINOIS APPELLATE COURTS 124 (1974).

54. *See, e.g.*, People v. Canfield, 12 Cal. 3d 690, 527 P.2d 633, 117 Cal. Rptr. 81 (1974); *In re* Bye, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974); Braxton v. San Francisco Mun. Ct., 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973).

55. *See, e.g.*, Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); People v. Crowe, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973).

TABLE 17

RELATIONSHIP BETWEEN VOTE TO GRANT HEARING AND VOTE TO "REVERSE" COURT OF APPEAL DECISION, SELECTED JUSTICES[a]

Justice (Year)	Aff.	Rev.	% Rev.
McComb (72)			
Deny	3	9	75%
Grant	8	7	47
McComb (74)			
Deny	3	5	63
Grant	11	13	54
Tobriner (74)			
Deny	4	1	20*
Grant	8	17	68*
Burke (72)			
Deny	2	7	78
Grant	8	11	58
Burke (74)			
Deny	4	3	43
Grant	5	16	76
Clark (74)			
Deny	4	4	50
Grant	10	13	57

[a]Justice included if at least 5 cases in "deny" cells of table.
*Difference significant at .05 level.

The data do not merit serious interpretation. However, it is interesting that they tend not to support our proposition; indeed, some justices were somewhat more likely to vote to affirm in cases that they had voted to hear. If similar findings were to be obtained with more extensive data, they would demand explanation in relation to some of the other findings reported here.

IV. Discussion

In generalizing from the findings of this study, some caution is required. The two time periods from which data were gathered may be atypical, although there is no reason to expect that this is the case. By the same token, it is unlikely, but possible, that patterns of decision-making in the treatment of petitions for cases with published court of appeal opinions differ from patterns of response to other cases. For the specific samples of cases analyzed, however, several conclusions can be stated.

First, the court did not respond with unanimity to petitions for hearing. Although most petitions received no votes for

hearing, the great majority of the others provoked disagreement among justices.

Second, some characteristics of cases which might be thought to influence the decision on hearing were not significantly related to votes on petitions for most justices. Neither subject matter, as defined for this analysis,[56] nor the presence of government agencies as petitioners, seems to have operated as an important cue for the court.

Third, disagreement among lower-court judges, as evidenced by court of appeal reversal or dissent, was positively associated with support for petitioners. This association was relatively weak in 1972, but quite significant for most justices in 1974.

Fourth, justices differed considerably in their relative willingness to hear cases with liberal or conservative decisions in the court of appeal. These variations in response to the ideological factor at the petition stage were congruent with differences in the justices' support for liberal and conservative positions in the court's decisions on the merits.

Fifth, in cases in which hearings were granted, the supreme court's decision on the merits usually differed from that reached in the court of appeal.

Several implications can be drawn from these findings. First, they give some support to the argument that the California Supreme Court follows basically a monitor policy in its screening of appeals. Both members of the court[57] and some observers of its policies[58] have indicated that it responds to petitions largely in terms of its assessments of the lower-court decisions in question. Where a majority of the justices tentatively disagree with the court of appeal decision in a case, they suggest, the supreme court is strongly inclined to accept a case.

The finding that the supreme court of the 1970's, like the court of the 1950's, tended to disapprove either the result in or the reasoning of the court of appeal in cases it accepted supports the theory of a monitor policy. More significant, however, is the new evidence concerning the ideology variable. The differences among justices in response to petitions from a liberal or a conservative decision below could result only from the fact

56. There were, of course, some limited exceptions to the general lack of significance of subject matter as a variable. *See* note 25 and accompanying text *supra*.

57. *See* authorities cited in note 35 *supra*.

58. *See, e.g.*, 1951 Note, *supra* note 5.

that the justices evaluate petitions in terms of their own policy inclinations. Once they have adopted a monitor policy, it is inevitable that justices who differ in their preference for alternative legal policies will react differently to the decisions that are being monitored. Thus we found differences among justices in decisions on the merits virtually mirrored in the votes to grant or to deny hearings.[59]

Further, the findings indicate the value of individual votes as data in the analysis of the court's screening decisions. Where there is a high level of dissensus in decisions on petitions, the factors in the court's decisions can be understood more clearly by examining individual behavior. Certainly the ideological differences among justices represent a factor that should not be ignored by one attempting to analyze the court's response to petitions.

Finally, the findings underline the fact that the court's behavior in all stages of its decision-making is a function of its membership. We are accustomed to viewing a court's decisions on the merits as being related to the values held by its judges. We are less accustomed to recognizing that even the agenda-setting activities of a court with discretionary jurisdiction are shaped in part by its composition. Yet our data make it clear that this is the case with the California Supreme Court: where liberal and conservative justices perceive petitions differently, the court's ideological center of gravity is crucial in determining what will be heard. This fact should remind us once again that of all the decisions associated with the judicial process, perhaps the most important are the decisions that determine the composition of courts.

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59. The scaling analysis presented in Baum, *supra* note 16, at 19-40, corroborates this finding. In that paper, the voting patterns on petitions for hearing were found to conform closely to a model in which justices' ideological positions were the *only* factors in their decisions.